

1 Scott P. Nealey (CA Bar No. 193062)
2 NEALEY LAW
3 71 Stevenson, Suite 400
4 San Francisco, CA 94015
5 Ph: 415.231.5311; fax: 415.231.5313
snealey@nealeylaw.com

6 (other counsel listed on signature page)

7 UNITED STATES DISTRICT COURT
8 NORTHERN DISTRICT OF CALIFORNIA

9
10 IN RE: VOLKSWAGEN “CLEAN DIESEL”
11 MARKETING, SALES PRACTICES, AND
12 PRODUCTS LIABILITY LITIGATION

MDL No. 2672 CRB (JSC)

13 This Document Relates to:

14 ALL ACTIONS

15
16 **RESPONSE TO BRIEF OF AMICUS
CURIAE THE COMPETITIVE
ENTERPRISE INSTITUTE’S
CENTER FOR CLASS ACTION
FAIRNESS**

17 Plaintiffs in certain Washington state actions and their undersigned counsel, appointed
18 prior to transfer as interim class counsel for Washington residents, hereby respond to the brief
19 of amicus curiae, The Competitive Enterprise Institute’s Center for Class Action Fairness
20 (CCAF) [Dkt #576]. Plaintiffs initially note that CCAF has no interest in this litigation, but
21 instead is an issue-oriented organization representing its own political views. The amicus brief
22 does not say whether CCAF owns a Volkswagen, or represents a Volkswagen owner. The fair
23 assumption then is that it does neither.

24 An auction bidding process is inappropriate here and would be conducive to undesirable
25 results. Auction bidding might simply create incentives via a reverse auction for lawyers to
26 settle too early for too little, which is perhaps the outcome that the amicus actually seeks.
27

1 Moreover, the premise for auction bidding offered by CCAF—that fees otherwise will be too
 2 high—presupposes that the Court will not do its job of determining that fees are reasonable. To
 3 the contrary, this Court, this district, and this circuit have a long history of overseeing fee
 4 requests with much scrutiny.
 5

6 THE AMICUS CURIAE HAS NO INTEREST IN THIS LITIGATION

7 CCAF is a political advocacy organization *possibly funded* in part by Volkswagen.¹
 8 While ostensibly representing the interests of consumers here, its attack on class action plaintiff
 9 lawyers is part of a bigger agenda embracing purported “sound science” to defend the corporate
 10 interests that support it. Auction based attorney fees is part of that “sound science.”²
 11

12 The Competitive Enterprise Institute (CEI), of which CCAF is a part, is an advocacy
 13 group based in Washington DC with long ties to tobacco disinformation campaigns and more
 14 recently to climate change denial.³ It calls itself “a non-profit, public policy organization
 15 dedicated to advancing the principles of limited government, free enterprise, and individual
 16

17
 18
 19 ¹ See Response re Motion to File Amicus Curiae Brief [Dkt #512]; but see Declaration of
 20 Theodore H. Frank in Opposition to Opposition/Response to Motion [Dkt #548].

21 ² “Sound science” is a phrase often used by corporate public relations and government agency
 22 spokesmen to describe the scientific research used to justify a claim or position. Sound science,
 23 however, has no specific scientific definition itself, so the phrase is used subjectively. “Sound
 24 science” is not a synonym of “good science” practices, but rather it is an ideological policy
 25 statement more about the criteria for the use of science in policy making. It is invoked mostly to
 26 call into question the validity of a given study or scientific statement. Source Watch, *Sound
 27 Science*, available at: <http://www.sourcewatch.org/index.php/Science> (last viewed Jan 7,
 28 2016).

³ Source Watch, *Competitive Enterprise Institute*, available at:
http://www.sourcewatch.org/index.php/Competitive_Engineering_Institute#cite_note-1 (last visited Jan. 7, 2016) (“Source Watch / CEI”).

1 liberty.”⁴ It postures itself as an advocate of “sound science” in the development of public
 2 policy.

3 In 1986, it began its “free market legal program,” which seeks to overturn government
 4 regulations that the CEI regards as inappropriate, such as regulations pertaining to drug safety,
 5 rent control, and automobile fuel efficiency.⁵ Since 1992, CEI has actively advocated against
 6 environmental laws and environmental education in the classroom, claiming for example in
 7 various publications that dioxin is good for you⁶ and that naturally-occurring chemicals
 8 produced by plants and other living organisms are as dangerous as industrial chemicals.⁷

9
 10 Many of its claims have been debunked. Here are a few examples related to climate
 11 change:

- 13 • Annenberg Political Fact Check, *Scientist to CEI: You Used My Research*
 14 *To Confuse and Mislead*, May 26, 2006 (link deactivated);
- 15 • Real Climate, *Thank you for emitting*, May 18, 2006, available at:
 16 [http://www.realclimate.org/index.php/archives/2006/05/thank-you-for-](http://www.realclimate.org/index.php/archives/2006/05/thank-you-for-emitting)
 17 [emitting](http://www.realclimate.org/index.php/archives/2006/05/thank-you-for-emitting) (last viewed Jan. 7, 2016);
- 18 • News Bureau, University of Missouri-Columbia, *MU Professor Refutes*
 19 *National Television Ads Downplaying Global Warming: Engineering*
 20 *Professor Curt Davis says TV Spots are Misrepresenting His Research*,

21 ⁴ Competitive Enterprise Institute, *About CEI*, available at: <https://cei.org/about-cei> (last
 22 viewed Jan. 7, 2016).

23 ⁵ *Source Watch / CEI*.

24 ⁶ Michael Fumento, *Rachel's Folly: The End of Chlorine*, Competitive Enterprise Institute,
 25 February 29, 1996, available at: <https://cei.org/search/node/rachel%27s%20folly> (last viewed
 Jan. 7, 2016).

26 ⁷ Jonathan Tolman, *Nature's Hormone Factory: Endocrine Disrupters in the Natural*
 27 *Environment*, Competitive Enterprise Institute, January 31, 1996, available at:
 28 <https://cei.org/studies-issue-analysis/natures-hormone-factory-endocrine-disrupters-natural-environment> (last viewed Jan. 7, 2016).

1 May 19, 2006, available at:
 2 <http://munews.missouri.edu/NewsBureauSingleNews.cfm?newsid=9842>
 3 (last viewed Jan. 7, 2016).

4 This is not a situation where CCAF and its lawyers represent an objector with an interest
 5 in the litigation. *Cf. In re Transpacific Passenger Air Transp. Antitrust Litig.*, C 07-05634 CRB,
 6 2015 WL 4776946 (N.D. Cal. Aug. 13, 2015). CCAF represents no one other than itself, its
 7 “donors,” and their political agenda.

8 As the parties properly before the Court are represented by competent counsel, the
 9 words of CCAF, who has no interest here or in any similar case, *see N. Sec. Co. v. United*
 10 *States*, 191 U.S. 555, 556 (1903) (leave to file denied), should be afforded little weight.
 11 Certainly, CCAF has no “unique information or perspective that can help the court beyond the
 12 help that the lawyers for the parties are able to provide.” *Ryan v. Commodity Futures Trading*
 13 *Com'n*, 125 F.3d 1062, 1063 (7th Cir. 1997) (citing *Miller-Wohl Co. v. Commissioner of Labor*
 14 & *Industry*, 694 F.2d 203 (9th Cir. 1982)(per curiam)).

17 **AUCTION BASED FEES ARE NOT SUPERIOR, ESPECIALLY HERE**

18 Competitive bidding is an approach taken by some courts in an effort to avoid some of
 19 the problems associated with the lodestar method. As has been noted by Wright & Miller:

21 Judge Walker of the Northern District of California has ruled in several cases that class
 22 counsel and their compensation would be determined by allowing competitive bidding
 23 between firms as to who should represent the class. And at least one other court has
 24 adopted that technique, although it has been seriously critiqued. Judge Easterbrook
 25 offered the following analysis:

26 There is, moreover, considerable question just what is being
 27 auctioned in bidding to represent a class. Normally an auction
 28 specifies the precise product to be sold (a particular painting, a share
 of stock in a named corporation, or 5,000 cubic yards of concrete
 having defined attributes). For legal services, however, it is hard if
 not impossible to hold the quality dimension constant. Contingent-
 fee arrangements are used when it is difficult to monitor counsel

1 closely; otherwise some different arrangement, such as hourly rates,
 2 is superior. ... When it is hard to monitor counsel's effort and other
 3 elements of quality, it is also hard to know what the bid represents.
 4 Maybe it shows that less work will be invested, and that less
 5 compensation then is required. ... Lawyers will earn a competitive
 6 return even at the lower level of compensation, but the class may be
 7 worse off. Large and sophisticated purchasers of legal services, such
 8 as Exxon/Mobil and General Motors, do not acquire legal services
 9 at auction; even clients able to monitor lawyers closely may be
 10 worried about the effect of the auction process on quality.

§ 1803.1 *Attorney Fees—Standards for Assessing*, 7B Fed. Prac. & Proc. Civ. § 1803.1 (3d ed.)
 (quoting *In re Synthroid Mktg. Litig.*, 325 F.3d 974, 979 (7th Cir. 2003)) (citations omitted).

In an article published in the Columbia Law Review, the author argues that the selection and retention of lead counsel by empowered lead plaintiffs is preferable to utilizing auctions to select lead counsel, finding, after a detailed examination, that lead-counsel auctions present serious problems and have serious shortcomings. The author concludes:

Careful scrutiny reveals that auction advocates have overlooked substantial methodological problems with the design and implementation of the lead counsel auction. Even if these problems were overcome, the auction procedure is flawed: Auctions are poor tools for selecting firms based on multiple criteria, compromise the judicial role, and are unlikely to produce reasonable fee awards.

Jill E. Fisch, *Lawyers on the Auction Block: Evaluating the Selection of Class Counsel by Auction*, 102 Colum. L. Rev. 650 (2002).

The perceived abuses of class action counsel have been addressed by means other than auctions. For example, the Class Action Fairness Act provides specific directions to courts regarding how to calculate fees in cases involving coupon settlements. These include setting the fee based on the value to the class members of the coupons redeemed, or, when injunctive relief also is included, using the lodestar method to set the fee award. These requirements are meant to address perceived settlement abuses when counsel receive large fees, but the awards to class

1 members have little or no value. 7B Fed. Prac. & Proc. Civ. § 1803.1 (citations omitted).

2 In the case at bar, although liability is admitted to some degree and while settlement
 3 seems near, the course of the case is not well established. No “fix” for the problem has been
 4 announced or proposed, and Volkswagen appears to be at loggerheads with the EPA according
 5 to multiple reports. Presently, there is no data, nor could there be absent a “fix,” of the future
 6 value of Class member’s vehicles. Accordingly, the amount of work involved in reaching a fair
 7 and full resolution of the issues is unknown and unknowable at this time. Under these
 8 circumstances, an auction is simply likely to provide additional pressure for a quick settlement
 9 and would empower those willing to bid low seeking one.

10 Additionally, an auction will reduce diversity of representation of class interests.
 11 Counsel who are willing or able to work for less—either as an individual firm or as a group—
 12 may be less capable of fully and fairly representing the various interests in the litigation where,
 13 as here, they are diverse. “Attorneys have legitimate concerns that their clients’ interests be
 14 adequately represented.” *Manual for Complex Litigation* § 10.224 (4th ed. 2004). For these
 15 reasons, the judge is advised to take an active part in the decision on the appointment of counsel
 16 and to consider a list of factors including “whether designated counsel fairly represent the
 17 various interests in the litigation—where diverse interests exist among the parties, the court may
 18 designate a committee of counsel representing different interests....” *Id.*

19 Finally, the likelihood of windfall fees raised by the amicus is not present in this
 20 case. Any “fee” request will – as it was by this Court and Judge Fern M. Smith in *In Re*
 21 *Bextra/Celebrex*, MDL 1699 – be carefully reviewed both as to the work that was done and the
 22 total compensation. Well established Ninth Circuit case law calling for various cross checks,
 23 *see e.g.*, *In re Bluetooth Headset Products Liab. Litig.*, 654 F.3d 935 (9th Cir. 2011), and this

Court's prior practice to look carefully at fee requests, will ensure not only that any fee award is fair and reasonable (and not an early, too cheap deal, designed to benefit only a few counsel negotiating in secret), but also that the fee awarded reflects the work done and its value to the members of the Class.

CONCLUSION

For all of these reasons, Washington Plaintiffs asks the Court to give little weight, if any, to the arguments of amicus curiae for the use of competitive bidding in the selection and compensation of counsel.

Respectfully submitted,

/s/ Scott P. Nealey
Scott P. Nealey (Cal Bar No. 193062)

NEALEY LAW
71 Stevenson, Suite 400
San Francisco, CA 94015
Ph: 415.231.5311; fax: 415.231.5313
snealey@nealeylaw.com

Debra Brewer Hayes (*pro hac vice applied for*)
dhayes@dhayeslaw.com
Charles Clinton Hunter (CA Bar No 93987)
chunter@dhayeslaw.com
THE HAYES LAW FIRM, PC
700 Rockmead, Suite 210
Houston, TX 77027
281-815-4963 Tel
832-575-4759 Fax

Stephen M. Hansen (*pro hac vice to be applied for*)
Law Offices of STEPHEN M. HANSEN, P.S.
1821 Dock Street
Tacoma, WA 98402
Ph: 253.302.5955; fax: 253.301.1147
steve@stephenmhansenlaw.com

1 *Interim Class Counsel for Washington State Residents and*
2 *Counsel for April Sims, Breck Lebegue, Amy Johnson, and*
3 *Mathhew Slichko*

6 **CERTIFICATE OF SERVICE**

7 I hereby certify that I served the forgoing through the Court's CM/ECF system upon all
8 counsel registered with that system.

9
10 Dated: January 8, 2016.

11
12 /s/ Charles Clinton Hunter

13 CHARLES CLINTON HUNTER